IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6812 of 2005

M/s Yashdhir Hotels Pvt.Ltd.
Mumbai .. Petitioner
(Orig.Deft no.1)

V/s

1. Mrs Sara Farhan Lukmani
2. Ms Yasmeen Mamoon Luknani
3. Ms Sharmila Iqbal Lukmani
4. Mrs.Jessica Iqbal Lumkani
5. Hotel Kings
6. Hotel Sea Kings
7. M/s Keer Hotels Pvt. Ltd
8. M/s Sukh Hotels Motels Pvt.Ltd..Respondents

(Orig.Plff-1
and deft nos.2 to 5)

Shri Y.S.Jahagirdar with V.A.Thorat with P.K.Vyas for the Petitioners

Shri Milind Sathe with A.Y.Sakhare with Jitendra Jain i/b S.Mahomedbhai and Sons for Respondent no.2

WITH

WRIT PETITION NO. 6813 of 2005

1. Hotel Kings

2. Hotel Sea Kings

3. M/s Keer Hotels Pvt. Ltd.

4.M/s Sukh Hotels Motels Pvt.Ltd..Petitioners

V/s

1. Mrs. Sara Farhan Lukmani

2. Miss Yasmeen Mamoon Lukmani

3. Ms Sharmila Lqbal Lukmani

4. Mrs.Jessica Iqbal Lumkani

5. M/s Yashdhir Hotels Pvt. Ltd.. Respondents

Shri Y.S.Jahagirdar with V.A.Thorat i/b P.K.Vyas for the Petitioners

Shri A.Y.Sakghare with Shri Milind Sathe with Jitendra Jain i/b s Mahomedbhai and Sons for Respondents

CORAM :S.R.SATHE,J.

DATED:8th Feb. 2006

JUDGMENT :-

1. Rule, returnable forthwith.

2. Heard Counsel on behalf of both sides at length.

3. Both these petitions filed under Article 227 of the Constitution of India are arising out of one and the same judgment and order passed by the Appellate Bench of Small Causes Court Bombay whereby the order dismissing

the plaintiffs' suit for possession passed by the Judge, Small Causes Court, Bombay was set aside and the decree for possession of the suit property in favour of the original plaintiff was passed. For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

4. Brief facts giving rise to these two petitions are as under :-

. One M/s M. Bloch Engineering Pvt.Ltd. was the lessee/tenant of original plaintiffs nos.1 to 4 in respect of open plot of land described in detail in Schedule annexed to the indenture dated 3-11-1966. M/s M. Bloch Engineering Pvt.Ltd. transferred and assigned the suit property to original defendant no.1 M/s Yashdhir Hotels Pvt. Ltd., a company registered under Companies Act. The original lease was for 98 years from 1-11-1966. By virtue of deed of assignment dated 8-6-1970 the original defendant no.1 became lessees in respect of unexpired period of lease. Thus M/s Yashdhir Hotels Pvt. Ltd. became the tenant of original plaintiffs nos.1 to 4. Initially the lease rent was Rs.3215/- per month. Thereafter it was increased to Rs.3450/- per month.

5. As the original defendant no.1 tenant was in arrears of rent for more than 6 months the original plaintiffs issued notice dated 1-3-1983 to defendant no.1. After

receipt of the notice defendant no.1 tendered rent for 14 months. However, the same was refused by the plaintiff landlords as entire rent due was not paid. According to the plaintiffs the defendant no.1 had unlawfully sublet the suit property to the defendant nos.2 to 5. Hence plaintiffs filed suit bearing No.RAE and R No.732/2538 of 1983 and claimed possession on the ground that defendant no.1 has become a defaulter.

6. The defendants filed their written statement and opposed the suit claim. They admitted that by virtue of assignment deed defendant no.1 became the tenant and lease rent was increased from Rs.3215/- to Rs.3450/- per month. According to them rent was to be paid after every six months. They denied that defendant no.1 was in arrears of rent as alleged by the plaintiffs. They had tendered cheque of Rs.1,03,500/- with letter dated 23-4-1983 but the same was wrongly refused by the plaintiffs. The defendants further contended that initial period of lease is 98 years. The defendants were in fact not in arrears of rent and during the subsistence of the lease period plaintiffs are not entitled to get possession of the suit property. Besides this, they also contended that defendant no.1 has not unlawfully sub leased the property. On the contrary the defendant no.1 was authorised to let out the structure or any part thereof and so accordingly defendants nos.2 to 5 are occupying the property. Hence on all these grounds the defendants contended that

plaintiffs are not entitled to get possession of the suit property.

7. On these pleadings the learned trial Judge framed issues. In order to prove the suit claim, plaintiffs examined Farhan Lukmani and Mammun Badruddin Lukmani. As against this on behalf of the defendants the director of defendant no.1, company was examined. After considering the evidence adduced by both the parties, the trial Judge came to the conclusion that the rent of the suit property was payable at every six months. So, according to learned trial Judge though defendants were in arrears of rent for more than 6 months on the date of notice dated 1-3-1983, plaintiffs were not entitled to get possession under Section 12(2) of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereafter referred to as Bombay Rent Act). He, therefore, dismissed the plaintiff's suit.

8. Being aggrieved by the said order, the original plaintiffs filed appeal NO.76 of 1997. After hearing arguments of both the learned Advocates the Appellate Bench of Small Causes court,Bombay came to the conclusion that rent in question was to be paid monthly and not at every six months as held by the trial Judge. They also held that notice terminating the defendant's tenancy was legal and valid and hence the plaintiffs are entitled to a decree for possession on the ground mentioned in Section 12(3)(a) of the Bombay Rent Act.

The learned Appellate Bench therefore allowed the appeal and set aside the order of dismissal of the suit passed by the learned trial Judge and passed decree for possession as well arrears of rent and mesne profits in favour of the plaintiffs.

9. Being aggrieved by the above mentioned order, the original defendant no.1-tenant filed Writ Petition No.6812 of 2005 while original defendants nos.2 to 5 filed Writ Petition No.6813 of 2005.

10. As both these petitions are arising out of one and the same judgment, the petitions are being disposed of by this common judgment.

11. It is not in dispute that initially the property was taken on lease by M/s H.Bloch Engineering Pvt. Ltd. under lease deed dated 3-11-1966 for a period of 98 years and monthly rent was fixed at Rs.3450/-. Admittedly by virtue of deed of assignment dated 8-6-1970 the original defendant no.1 became tenant. It is also not in dispute that the plaintiffs issued notice dated 1-3-1983 to the defendant no.1 and called upon him to pay arrears of rent of 28 months. It is also admitted that defendant by their advocate’s letter dated 24-3-1983 sent a cheque for Rs.1,03,500/- towards entire arrears of rent till then. Thereupon the original plaintiffs through their Advocate’s letter asked the defendant no.1 to confirm whether the said cheque is to

be accepted without prejudice, subsequently plaintiffs returned the said cheque.

12. Shri V.A.Thorat, learned Senior Advocate for Appellant original defendant no.1 has urged before me 3 points. Firstly, he submitted that rent was to be paid by the defendant no.1 after every 6 months and not by every month. Secondly, he canvassed before me that lower court did not take into consideration clause 8(c) of the lease deed by virtue of which the defendant was entitled to comply the demand made by the lessor for arrears of rent within a period of 3 months and the defendant no.1 had tendered the cheque of entire arrears on 23-4-1983 i.e. within the period of 3 months from the receipt of notice. So, according to him there was in fact no cause of action for the plaintiff to file the present suit. Lastly, he argued that period of lease is 98 years, the same is still not over so, during the subsistence of the lease period plaintiffs are not entitled to recover possession on the ground of arrears of rent and defendants are entitled for relief against forfeiture for non payment as per Section 114 of Transfer of Property Act. He, therefore, submitted that the learned Appellate Bench of Small Causes Court has wrongly held that plaintiffs are entitled to get possession as per Section 12(3)(a) of Bombay Rent Act. For all these reasons, he submitted that writ petitions be allowed and the order passed by the Appellate Bench of Small Causes Court,Bombay be set aside.

13. Shri Y.S.Jahagirdar, learned Senior Advocate for original defendants nos.2 to 5 submitted that during the trial the plaintiffs had in fact given up their case that defendant nos.2 to 5 are unlawful sub-tenants. According to him the defendant no.1 was authorised to carry out construction and give the same to others and as such decree for possession cannot be passed against defendant nos.2 to 5. He, therefore, submitted that the suit against defendants nos.2 to 5 be dismissed.

14. as against this, Shri A.Y.Sakhare,learned Senior Advocate for the original plaintiffs supported the the judgment and order passed by the Appellate Bench of Small Causes court, Bombay.

15. From the perusal of the lease deed dated 3-11-1966 and in particular, clause 3A of the same, it is very clear that monthly rent was fixed at Rs.3215/-. Admittedly, subsequently it was increased to rs.3450/- per month. Though initial lease is in respect of open land, there is absolutely nothing in the said deed to indicate that lease was not monthly. In fact the stand taken by the defendants was also that though it was monthly lease as per oral agreement between the parties rent was to be paid after every 6 months or so. At the outset, it must be mentioned that though the defendants took plea regarding such oral agreement they could not adduce any convincing evidence in that behalf. Merely

because at times the defendants had paid rent after 4 months or 6 months and plaintiffs had accepted the same that does not mean that agreement between the parties was to pay the rent after every 6 months. In fact, if we peruse clause 1 of the original lease deed we find that it is clearly mentioned that monthly rent of Rs.3215/- is payable in advance regularly on or before 5th day of each and every English Calendar month. So, in view of this stipulation in the lease deed and in the absence of any evidence to show that subsequently there was any agreement contrary to the above mentioned condition, the Appellate Bench of Small Causes court has rightly held that rent was payable monthly and not at every 6 months.

16. Both the Courts below have in fact rightly held that when the suit notice dated 1-3-1983 was issued the defendant no.1 was in arrears of rent for more than 6 months. The concurrent findings in this behalf is unassailable.

17. The main point urged before me is that during the period of subsistence of lease, plaintiff was not entitled to recover possession on the ground of arrears of rent as there is no such provision for forfeiture of lease in the lease deed. According to the learned Senior Advocate for the defendant no.1 as the payment of arrears of rent was made within 3 months from receipt of notice the defendant was relieved against forfeiture as

per Section 114 of Transfer of Property Act. For this proposition he has placed reliance on a case Sr Ramakrishna Theatres Ltd. V/s General Investments and Commercial Corporation ltd. and Ors. **AIR 1993 Karnataka 90 (Full Bench)** wherein the full Bench of said High Court considered the provisions of Section 21 of Karnataka Rent Control Act with Section 114 of Transfer of Property Act and held that tenant holding lease hold premises as lessee under a term lease containing no provisions for forfeiture of lease in lease deed is entitled to get relief as per Section 114 of Transfer of Property Act. However, the facts of the said case and the facts of the case in hand are different. Besides, the wording of Section 21 of Karnataka Rent Control Act and Sec. 12(3)(a) of the Bombay Rent Act are different. Section 21 starts with non obstinate clause. However, here we are concerned with the provisions of Sections 12(3)(a) of Bombay Rent Act. In order to decide the controversy it would be worthwhile to see what Section 12(3)(a) and Section 114 of Transfer of Property Act say:

> Section 12(3)(a): Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section

(2) the court shall pass a decree for eviction in any such suit for recovery of possession.

Section 114. Relief against forfeiture for non payment of rent - Where a lease of immovable property has determined by forfeiture for non payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrears, together with interest thereon and his full costs of the suit, or gives such security as the court thinks sufficient for making such payment within fifteen days, the court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture, and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

18. In order to find out whether there was any provision for forfeiture in the lease deed in question and whether there is any substance in the argument advanced by the learned Senior Advocate for the defendant no.1 that payment of arrears of rent made even after one month and within 3 months from receipt of notice is valid. It would be worthwhile to reproduce the relevant provisions in the original lease deed.

8(c) If and whenever any part of the rent hereby reserved shall be in arrears for a period of 30

days, whether the same shall have been legally or formally demanded or not and also if and whenever there shall be a breach or non observance or non performance of any of the covenants by the Lessee herein contained or of the provision hereof, the Lessors may re-enter upon the demised premises or by part of the demised premises in the name of whole and immediately thereupon this demise and all rights of the lessee hereunder shall absolutely determine **PROVIDED that except in the case of non payment of ground rent,** the Lessors shall, before exercising the right of re-entry herein contained, give to the Lessee three months' notice in writing specifying such breach and requiring the Lessee to remedy the same;

8(d) Without prejudice to the other rights and remedies which the Lessors may have under these presents or under law, the Lessors shall be entitled to and the Lessee shall be liable to pay and shall pay to the Lessors, interest at the rate of 9% per annum on the ground rent hereinabove provided if the same is not paid by the Lessee to the Lessors punctually on the due date i.e. on the 5th of each calendar month; (emphasis is mine)

19. Firstly, it must be noted that merely because the provision was made in the said lease deed regarding payment of interest on arrears of rent it cannot be said

that merely by payment of interest on arrears of rent, default was to be regularised. It was a special enabling provision whereby lessor was authorised to recover such interest on arrears of rent and lessee is under obligation to pay the same. So, the case cited by the learned advocate for defendant no.1 does not help the defendant to show that defendant was entitled to get relief against forfeiture. On the contrary from the language of clause 8(c) mentioned above,it is very clear that while terminating the tenancy on the ground of non payment of rent it was not even obligatory on the part of the plaintiff landlord to issue notice of 3 months. so, the defendant no.1 is not at all entitled to take aid of Section 114 of Transfer of Property Act. While considering this aspect, it is necessary to note the observations made by the Apex Court in a case of Arjun Khimalal Makhijani V/s Jamnadas C. Tuliani and Ors. and Prithdayal Chetandas and Ors. V/s Jamnadas C. Tuliani and Anr. - < **(1989)4 SCC 612**> to which my attention has been drawn by Shri A.Y.Sakhare, learned Senior Advocate for the plaintiff. That was a case where rent was in arrears for more than 6 months and the same was not paid by the tenant within one month of service of demand notice issued as per statute. That was also a case prior to coming into operation of amended Rent Act of 1987. In the instant case the suit is filed in the year 1983. So, obviously Amendment Act 18 of 1987 is not applicable. So, the facts of the said case and the facts of case in hand are quite identical

and as such the observations in the above stated ruling are applicable to the facts of the present case. In the above cited ruling Their Lordships have observed :

> 13. Learned Counsel for the tenants then urged, relying on Praduman Kumar v. Virendra Goyal that at all events the tenants were entitled to be relieved against forfeiture for non payment of rent under Section 114 of the Transfer of Property Act benefit of which could be given if deposit of rent was made at any stage of the hearing of the suit. In our opinion, there is no substance in this submission either inasmuch as Section 114 of the Transfer of Property Act cannot be applied to a case where the suit for eviction of a tenant has been instituted not on the basis of forfeiture of lease under the Transfer of Property Act but on the basis of statutory provision dealing specifically with the rights and obligations of the landlords and tenants such as Section 12 of the Act. In a case where a tenant renders himself liable to be evicted on the ground of being defaulter in the payment of rent as contemplated by sub sections (2) and (3)(a) of Section 12 of the Act,bar from the way of the landlord in instituting a suit for ejectment of a tenant is removed and he

gets in right to have a decree for eviction. Such removal of bar is not in any sense forfeiture of any rights under lease which the tenant held. Section 114 of the Transfer of Property Act which provides relief against forfeiture for non payment of rent applies to a case where a lease of immovable property is determined by forfeiture for non payment of rent.Section 111 of the Transfer of Property Act deals with various contingencies whereunder a lease of an immovable property determines. Clause (g) contains one of such contingencies being by forfeiture inter alia in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter. In a case where forfeiture of lease is claimed for non payment of rent, it would, therefore, have to be established that one of the express conditions of the lease provided that on breach of that condition namely on non payment of rent the lessor was entitled to re-enter. It is only in those cases where such an express condition is contained in the lease and the lessee breaks the said condition and the lessor on his part gives notice in writing to the lessee of his intention to determine the lease that a

> lease of immovable property determines by forfeiture for non payment of rent. In the instant case, the suit was not based on any such forfeiture of lease under the Transfer of Property Act but was filed for the enforcement of the statutory right conferred on the landlord by sub-sections (2) and (3)(a) of Section 12 of the Act."

20. In view of the above observations of the Apex Court and the facts of the present case which indicate that defendant no.1 committed breach of conditions in the lease deed and became a defaulter, it must be said that defendant no.1 is not at all entitled to get relief as per Section 114 of Transfer of Property Act. Incidently, it must be noted that similar contention was in fact taken by the defendant and an application to that effect was also filed in the trial Court. However, the trial court negatived the said contention vide its order dated 28-10-1996. Admittedly, the defendant did not challenge the said order in the higher court at any time. Thus having regard to all these aspects I have no hesitation to hold that there is no substance in the arguments advanced by the learned Senior Advocate for the defendant no.1 in this behalf.

21. A feeble attempt is made on behalf of the defendants nos.2 to 5 to show that they are lawful sub tenants and as such they cannot be evicted. It is true

that during the trial the plaintiff did not insist decree for possession on the ground that defendant no.1 has unlawfully sub leased the premises. However, that does not mean that when the decree for eviction is passed against the original tenant the defendant no.1, the defendants nos.2 to 5 can retain the possession. Admittedly, there is no privity of contract between the plaintiff and defendants nos.2 to 5. So, if decree for possession is passed against original defendant no.1 the same is obviously binding on the defendants nos.2 to 5.

22. Thus it is clear that the order passed by the Appellate Bench of the Small Causes Court, Bombay is legal and correct. There is no error of law and as such there is no necessity to interfere with the same. Hence the petitions are dismissed with costs.

. Rule discharged.

. However, the defendants are granted time till 31-5-2006 to vacate the suit property.

. At this stage Advocate Shri P.J.Thorat holding for Shri A.K.Vyas Advocate for the defendants submitted that defendants intend to approach the higher court against the above order and as such the operation of the same be stayed for a period of 10 weeks. However, considering the fact that the suit is of 1983 and in the present order the time is already granted till 31-5-2006 to

vacate the suit property, I do not think that there is any necessity to stay the operation of the above mentioned order. Hence the prayer in that behalf is rejected.

(S.R.SATHE,J.)